

All is Fair in Love and War?

Applying the principle of discrimination in Afghanistan

Eli Foss



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Department of Political Science

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Abstract

The purpose of this thesis is to explore the applicability of the principle of discrimination in Afghanistan. Two research questions seeks to find out whether it is possible to draw a distinction between combatants and non-combatants in Afghanistan, and whether it is possible to prepare soldier for difficult situations arising when making this distinction. Just war theory is used as a basis for the analytical framework. The study concludes that the traditional group-based criteria for distinguishing between combatants and non-combatants in conflicts are not applicable in Afghanistan. Based on Larrys May's interpretation of just war theory I suggest that a distinction in insurgency conflicts should rather be based on a behaviour-based approach, as this approach proves more successful in Afghanistan today.

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All mistakes in this thesis are of course solely my responsibility.

Eli Foss

Oslo, 16 May 2012

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1 Introduction

An old English proverb claims that all is fair in love and war. For war at least, this is not entirely true. Governing conduct in war has been attempted for as long as wars have been fought. Whether this has been successful or not is another matter. Rules in war have existed as long as war itself, but it was not until the 19th Century that laws governing the conduct of war became internationally binding. Henry Dunant initiated the process of developing a legal framework for conduct in war after the battle of Solferino in 1859. Since then, important international legislation has been developed and recognised by most states in the world. This thesis will deal with one of the most important principles of warfare, the principle of discrimination.

The principle of discrimination seeks to distinguish between those who are liable for attack in war, and those who are not. This also entails that it draws a line between those who have the right to use force, and those who do not. Drawing this distinction is more complicated than it sounds and the question of how to define combatants stands at the core of the principles problem as international and non-international armed conflicts have become increasingly more complex. The aim of this thesis is to explore how soldiers apply this principle in unconventional conflicts where the lines between combatants and non-combatants are often undetermined and blurred.

1.1 Purpose of the study and research question

The Afghan conflict is a conflict of insurgency. Such conflicts are characterised by blurred lines between those who take part in hostilities, and those who refrain. Respecting international law however means distinguishing between combatants and non-combatants in warfare. Making this distinction in Afghanistan is a challenge for the International Security Assistance Forces (ISAF), as the insurgents are known to blend in with the civilian population to avoid detection. The purpose of this study is twofold; first, it will explore whether the principle of discrimination is applicable in the conflict in Afghanistan. I will do so by comparing the criteria for distinction, as discussed and interpreted in just war theory (JWT) and international humanitarian law (IHL), with the criteria used by the Norwegian Armed Forces to draw such a distinction in Afghanistan; secondly, I will explore whether it is

possible to prepare soldiers for the moral dilemmas they may face when drawing such a distinction in insurgency conflicts. The thought behind this is to explore how and whether the soldiers' ethical education can be improved and adjusted to counterinsurgency (COIN) operations. As this is a small-n study, the aim is to obtain thick and holistic descriptions that will lead to a better understanding of international humanitarian law and just war theory's relevance (or lack thereof) in the Afghanistan conflict, and possibly in COIN operations in general.

From the stated purposes above, the research questions are as follows

- 1. Is it possible to distinguish combatants from non-combatants in Afghanistan?*
- 2. Is it possible to prepare soldiers for the task of drawing a distinction between combatants and non-combatants in COIN operations?*

Using IHL and JWT as a foundation for my analytical framework I will address the following questions in order to answer the above research questions;

- *How, if possible, do Norwegian Armed Forces distinguish between combatants and non-combatants in Afghanistan?*
- *Which indicators are the Norwegian Armed Forces using when detecting enemies, and how do these match indicators used for distinction in IHL and JWT?*
- *Does pre-deployment training match the challenges Armed Forces encounter in Afghanistan?*

1.2 Outline of the thesis

The next chapter Research methods will discuss the methodological aspects in this thesis. It will especially focus on the challenges concerning the choice of case study as a research method, and the use of qualitative interviews as a method for data gathering. It will also discuss issues concerning the evaluation of qualitative research, notably the reliability and validity of the study. Chapter 3 Background, will give a presentation of the chosen case. I will describe the Norwegian Armed Forces' role in Afghanistan, and present the nature of the

conflict. In chapter 4 Just war theory and analytical framework, I will present the main features of just war theory, and a presentation of the principle of discrimination in just war theory and international humanitarian law. I will also present a framework for analysis where I use just war theory and international humanitarian law to discover indicators for identifying and distinguishing between combatants and non-combatants. This theoretical framework will be applied in chapter 5 Findings and analysis. The last chapter, Conclusions and implications, will summarize the main findings of the study as well as present the theoretical and practical implications this study might lead to.

2 Research Methods

This chapter will focus on research methods in political science, and the methods used in this study. It will discuss the methodological choices that have been made here, especially the use of case study research and qualitative interviews, as these are essentials for my research design. The last part of the chapter is devoted to research ethics as well as a discussion of the validity and reliability of the study.

2.1 Research design

The Law of Armed Conflict was made with conventional warfare in mind. One of the central elements is that there should be a clear distinction between combatants and civilians, giving only the former the right to use force, and at the same time protecting civilians from the torments of war. This is known as the principle of discrimination or distinction¹. The principle is however open to interpretations with regard to who belong to which of the groups combatants and civilians. Since the establishment of the Geneva Conventions in 1949 and its subsequent additions in 1977, there have been more unconventional warfare than conventional wars, a term associated with the First and Second World Wars. As such, the question of whether the principle of discrimination is applicable in unconventional warfare becomes relevant.

All research methods have their advantages and disadvantages, and choosing a method for a study is based on how to best answer the initial research question. This study aims to explore the applicability of the principle of discrimination in unconventional wars; more precisely whether it is possible to apply this principle in the current conflict in Afghanistan. Little research has focused on this before; a qualitative approach that allows for an exploratory approach is therefore suitable. This gives the researcher the opportunity to change course during the study as he or she learns more about the field, or if more relevant data are discovered. For this study a case study design is particularly suitable as such designs give the researcher the opportunity to seek detailed knowledge about a phenomenon delimited in space and time (Gerring, 2007).

¹ I will use the term discrimination in this thesis.

2.2 Case study Research

Case studies within political science were long regarded as secondary to statistical methods, which is considered not only as providing more precise measurements, but also a clearly specified scope for generalisation. However, as this positivist view has somewhat faded it has in recent years become natural to regard case studies as an effective method of research. For, where statistics can determine causal effects between variables, case studies, as Gerring (2007:49) points out will allow the researcher to undertake thick and holistic investigations which can explain these causal effects. Such a study, he continues (Ibid:19-20) may be the study of an event, a phenomenon or an instance with spatial or temporal boundaries.

2.3 Case selection

There are several reasons for narrowing down the focus in research. Perhaps the most important one is that one cannot possibly cover all aspects of an issue. This is particularly true here, as this thesis offers limited space for discussion. I have chosen to study the principle of discriminations applicability in the Afghan conflict. To answer the research questions I use qualitative interviews as a method for collecting data. This automatically narrows down the case, as the number of interviews, and the availability of interview objects limits the study's scope. In order to answer the research questions, the unit that will be studied is ISAF. This alone poses a number of methodological challenges. First of all, there are 42 contributing nations to ISAF (NATO, 2009). Seeing ISAF as an entity is therefore not possible as the varying levels of activity, different institutional cultures, and the difference in which Afghan region they are operating in are great. Studying the Norwegian contribution to ISAF is a natural choice as I am based in Norway and have limited resources to travel both in terms of finances and time, as this is a master's thesis and a rather small project. The six informants I interviewed, but one lived in proximity to Oslo. As both the war college, the Norwegian Defence University College, and the Armed Forces administrative headquarters² are placed in Oslo, narrowing the search for informants to this area seemed logical.

² The Norwegian Joint Headquarters are based in Bodø.

As well as narrowing the scope of objects to study, it is also logical to limit the temporal scope of the study. The first Norwegian contingent to ISAF deployed in 2003. Today the contingent consists of 525 military personnel.³ Approximately 300 of these are based in Maymanah, in the Faryab province where Norway commands one of ISAF's Provincial Construction Teams. The remaining personnel are split between the National Contingent Command (NCC) and the National Support Element (NSE) in Mazar-e-Sharif, and Commander ISAF (COMISAF) in Kabul (NATO, 2011).⁴

The Norwegian forces were first deployed to Maymanah in 2006. That is also the year where the coalition forces started to experience a growing resistance in Afghanistan. This led to more combat situations for Norwegian Armed Forces, and thus more situations where dilemmas concerning how to apply the principle of discrimination. From November 2009, NATO activated the NATO- training mission in Afghanistan. NATO's stated aim for the mission is to train Afghan security forces and to support capability development, so that they will be able to maintain the country's security once ISAF forces withdraw in 2014. The Norwegian Armed Forces have been a part of this training mission, and as the Afghans have gained more and more control over the operations, the Norwegian Armed Forces have taken on a role of mentoring. This has led to fewer combat situations for the Norwegian Armed Forces as the Afghan security forces have mainly carried out these missions. Consequently, this has led me to limit the temporal boundaries for the study to the years 2006-2010.

2.4 Qualitative Interviews

Qualitative interviews are widely used within case studies as they give the researcher the opportunity to obtain deep knowledge of an issue through informants who often have first-hand experiences of the phenomenon in question. Qualitative semi-structured interviews are used in this study because it is essential to comprehend a person's thoughts and reflections about the difficulties with applying the principal of discrimination in Afghanistan. Such knowledge can be obtained through in-depth interviews – not through structured interviews, as structured interviews does not allow for the respondents to elaborate on issues that can lead

³ As of May 2012. See <http://www.isaf.nato.int/troop-numbers-and-contributions/norway/index.php>.

⁴ Numbers do not include Special Operations Forces.

to a better understanding of the phenomenon. Obtaining much and detailed information about the phenomenon is thus the greatest advantage of this method. One of its drawbacks is that the selection of informants makes it hard to compare answers due to the partially unstructured interview, and to generalise the findings. A further description of the interviewing process will be given in the following sections.

2.4.1 Preparing for interviews

Postholm (2005:82) emphasizes the importance of having studied the case before starting the interviews. This she says will help the researcher to ask questions which the informants find relevant, and in that way obtain more data for the project. When preparing for the interviews I therefore had several informal conversations with people whom I knew, who were serving or had served in the Norwegian Armed Forces. These conversations gave me an impression on the organisational structure within the army, the relationship between the different levels and offices, as well as a valuable insight into the culture that exists within such an organisation. These informal conversations became very useful for the composition of my interview guide⁵ in terms of which questions to ask, and how to proceed during the interview.

Furthermore, Andersen (2006) argues that having a good overview of the field of research will give the researcher a vantage point when it comes to the interview situations, as he or she will have a better understanding of the informants' situation and experiences. Before starting collecting the empirical data, I took steps to gain more detailed knowledge of the conflict in Afghanistan; ISAF's role in the conflict; and perhaps most importantly; the Norwegian Armed Forces' role in the conflict. I also found it necessary to gain a better understanding of the Norwegian Armed Forces as an organisation, and the military jargon before starting the interviews. This would keep the focus on the subject matter, as my informants would not need to stop, stop and explain what they think of as general knowledge during the interviews.

2.4.2 Selection criteria and finding informants

Quantitative research stresses the use of randomisation when choosing informants. This is important, as the aim often is to generalise the results back to the population from which the informants were drawn. Although qualitative studies too aim for generalisation, this is more

⁵ See appendix A.

problematic than in quantitative research as informants are chosen because of their insight into, and knowledge of the phenomenon in question. As choosing informants with a special insight into a topic, researchers look for subjects who can give them first-hand knowledge of the issue in question. In order to get the information needed, however, it is important to choose the “right” informants for the study. I had therefore outlined criteria that the informants I contacted had to fulfil in order to participate in the study. The first and most important criterion was that the person needed experience from combat situations in Afghanistan. This was crucial as the aim of the study was to explore how the Norwegian Armed Forces apply the principle of discrimination in Afghanistan. Not all military personnel that had served in Afghanistan had such experiences due to rank or position. Having established this, it became clear that the informants I was looking for were personnel with operational experience. I therefore chose to interview persons with the rank of Captain or lower.

Secondly, criteria such as the amount of time they had spent in Afghanistan and at what time they had been there were important. It is generally known that the situation in Afghanistan started to deteriorate in 2005/2006, and it is therefore reasonable to believe that Norwegian Armed Forces did not experience many hard combat situations before this time. How much time they had spent there also increased the chances of having been in several combat situations. Due to their increased possibility of combat experience, this could mean that they would contribute with more information. I therefore saw it as advantageous if those I contacted had been deployed several times.

The process of finding informants for my study proved to be more challenging than expected. Due to the topic of the thesis, many of the soldiers I contacted were reluctant to talk about ethical issues and therefore chose not to participate. Through several informal conversations, it became clear that the reluctance to participate was partially due to the fact that media coverage of the Norwegian soldiers’ conduct had been criticized in the last couple of years⁶. Avoiding further negative reports seemed to be a concern for some of them. I was fortunate enough to have a few entry points that I could use in order to find informants. These were friends and acquaintances who worked, or had worked in the Norwegian Armed Forces. Four

⁶ A report on the Norwegian soldiers in the magazine ”Alfa”, published in 2010, made the headlines in Norwegian newspapers claiming they had said that ”killing is better than sex”, and used battle cries referring to Nordic mythology to motivate themselves before battles. See for example; <http://www.vg.no/nyheter/innenriks/artikkel.php?artid=10036779>.

of the informants were therefore recruited through my personal network. I got in touch with the two other informants by using the *snowball method*, a recruiting strategy often used in qualitative research to gain access to informants through already recruited informants. This is a method which is especially useful when the researcher has problems accessing into a particular milieu or a closed organisation (Tansey, 2007).

2.4.3 Interviewing

The interviews lasted 25 to 50 minutes, and were of a semi-structured character. They were all recorded and transcribed with the informants' consent⁷. The advantage with semi-structured interviews is that they allow the researcher to alter the questions and structure during the interviews if the researcher believes that this will lead to relevant and important information that could not necessarily otherwise be obtained. All interviews, but one were conducted in person at various locations in Oslo and its surroundings. The last interview was conducted by video conference, as the informant did not live in proximity to Oslo. Leech (2002) has accentuated the importance of making the informants feel at ease during the interviews, I therefore let the informants choose the time and place for the interviews in most cases. The semi-structured approach allowed me to ask follow-up questions where necessary, something which I found particularly beneficial. I also took notes during the interviews to remind me of topics the informants spoke of, and that I thought especially relevant and important at the time.

2.5 Evaluating the study

Not all agree that validity and reliability are good criteria for evaluating qualitative research, as they are often associated with quantitative methods. Others, such as Hammersley, assert that the terms may also be applied in qualitative research, though with a few modifications (Bryman, 2004:276). The reality is that even though different schools of researchers have different wordings for the two concepts, they are all utilising some sort of evaluation criteria based on, or similar to validity and reliability, to test and confirm the quality of their work. In

⁷ See appendix B.

this study I will utilise the terms validity and reliability to discuss strengths and weaknesses of the thesis.

2.5.1 Validity

According to Yin (1994:34), a valid study is one in which conclusions accurately represent the real world events that were studied. Yin's statement is closely connected with strong internal validity, which is one of the foremost strengths of case study research. Strong internal validity, then, means that the research design and data of the thesis are credible. This entails that the data collected answers the research problem it was meant to answer, and that the research has been conducted according to good research practices (Bryman, 2004:274). The research questions in this thesis have been answered through collecting data from informants from the Norwegian Armed Forces. As the purpose of this study has been to answer whether it is possible to distinguish between combatants and non-combatants in Afghanistan, and whether Norwegian Armed Forces are able to prepare for this challenge, interviewing soldiers on an operational level with first-hand knowledge of the problems is important. After all, having these "experts" on the subject as a source of data is essential for answering the research questions. I will therefore assess the internal validity of the study to be good.

Another important criterion I would like to address here is external validity. A case study consists of a small number of cases, and this is one of its greatest advantages when it comes to obtaining thick data. However, where you can get thick and holistic knowledge from a case study, it will necessarily suffer from problems of representation (Gerring, 2007:43). This means that while case studies are strong in internal validity, they are weaker in external validity. A single-case study such as this one will hence have the problem of weak(er) external validity as it is difficult to generalise the study's findings to a larger population. The generalisation of the study should however not be entirely discarded, as results from small-n studies can be transferred to other studies with similar cases as long as the researcher is careful to limit the scope of the generalisations (George and Bennett, 2005:119). It is therefore likely to believe that the results from this study can be transferred to other military units serving in Afghanistan, and also possibly to military units serving in similar COIN operations.

One last issue to consider before moving on to reliability, is the issue of objectivity. Objectivity is closely related to internal validity and the credibility of the study. Some argue

that objectivity in qualitative research is never obtainable. Others, leaning toward a more positivistic approach to research argue that researchers should be very careful with interpreting an informant's statements too subjectively, as this would weaken the credibility of the collected data. I have tried my best not to let my own opinions and expectations influence the data when I have interpreted them, and instead tried to remain critical to the information the informants have given me. I have also kept in mind that the informants as members of the Armed Forces may due to their training and long engagement with the Armed Forces as an institution be overtly positive to the ways the organisation work and function.

2.5.2 Reliability

To ensure that a study establishes a high level of reliability, the researcher should provide as much information about the research process as possible. Such transparency will allow others to assess whether the researcher has interpreted the data correctly, and thus if the results of the study are dependable. Transparency however might be problematic in studies using interviews for data gathering as this might interfere with principles of protecting the anonymity of informants. The transcripts from the interviews in this study have been destroyed in accordance with guidelines from the Norwegian Social Science Data Services (NSD). I have however tried to improve the reliability of the study by including an extensive amount of citations from the transcripts, without compromising the anonymity of my informants. This has enhanced the transparency of the study, but in terms of replicability, the reliability of the study still has some weaknesses.

2.5.3 Research Ethics

The researcher has an important responsibility to look after the informants' interests throughout the process (Kvale, 2009:52-53). All six informants that I interviewed were informed of the study's topic both before agreeing to participate, and again before the interviews started. All informants signed an informed consent, informing them of how the interviews would proceed, how I would handle the data, and about their right to anonymity and to withdraw from the study at any point. The informed consent and the insurance that the informants would remain anonymous were particularly important given the topic of the study, and are in line with national guidelines on research ethics (NESH, 2010). I approached several people about participating in the study, and although many were happy to talk about the

subject, few actually wanted to participate in the study. Although they had different reasons for this, common points were the sensitivity of the topic in question, the media coverage the ethical side of the ISAF operation had received, and their fear that their anonymity could be compromised. The process of obtaining consent from the informants, handling of the registered information of the informants and the actual data have all been done in accordance with the guidelines I have been given from the Norwegian Social Science Data Services (NSD).

3 Background

This chapter will give a short introduction to the history of the ISAF mission, as well as an overview over the present situation in Afghanistan. Firstly however, some background information on ISAF is needed. I will therefore outline the background for the establishment of the forces, and its history starting with the 9/11 attacks. Although the Afghanistan conflict is a complex one with regard to participating actors, I will in the second part of this chapter give an account of the different actors and structures of the conflict. However, as this thesis focuses on ISAF and the applicability of the principle of discrimination, I will not give a detailed account of the Afghan ethnic groups and the numerous insurgent constellations that exists. Thirdly, I will outline ISAF's mission and mandate in Afghanistan, and fourthly an account of the Norwegian contingent. In the last part of the chapter I will turn to the nature of the conflict where I will elaborate on the type of conflict that is being fought in Afghanistan, and ISAF's strategies to counter the challenges this creates.

3.1 Backdrop

Almost immediately after the 9/11 attacks on the World Trade Centre in New York and the Pentagon in Washington DC, NATO invoked article five of the North Atlantic Treaty for the first time (NATO, 2001). The United States however chose not to act through NATO when they within short time after the attacks launched Operation Enduring Freedom (OEF), sending troops into Afghanistan. Members of NATO and other states supporting the US were instead invited to contribute to the operation under US leadership. OEF was part of what President George W. Bush called the War on Terror, seeking to find and eradicate terrorist organisations and terrorist cells. Al-Qaida had taken responsibility for the attacks, and it soon became apparent that the organisation's roots could be traced back to Afghanistan. Although never recognised by the international community, the Taliban was Afghanistan's de facto authority. The regime had close ties with Al-Qaida, providing the organisation with training facilities and funding. As the Taliban chose not to cooperate with the US after the attacks, toppling their regime became one of the means of seeking out Al-Qaida members and other terrorist cells. On October 7th 2001 more than 50 000 US soldiers with additional forces from their allies entered into Afghanistan. The Taliban regime fell in November 2001, and the

international community led by the United Nation agreed upon the establishment of an interim government in Afghanistan until elections could be held.

The UN hosted Bonn conference in December 2001 and the subsequent Bonn Agreement established an international security force upon the request of the Afghan Transitional Authorities. The purpose of these forces was to help the Afghan authorities to establish peace and stability until they would be able to do so themselves. The United Nations Security Council (UNSC) resolution 1386 therefore called for an International Security Assistance Force (ISAF) to be established with the purpose of securing Kabul and the surrounding areas (UNSC, 2001). The British-led forces were in place by February 2002 and the agreement was that the security forces were to take over the responsibility of these areas while the OEF coalition forces withdrew from densely populated areas, shifting their attention to the mountains where Al-Qaida members and the Taliban allegedly were hiding (Hammes, 2006:154). The leadership of the operation changed leading nation every six months until August 2003, when this arrangement was not thought to give enough continuity and the UNSC therefore requested that NATO assumed leadership of the operation. As 2003 drew to an end, reports of the deteriorating security situation in Afghanistan emerged. This led to the UNSC resolution 1510 which expanded ISAF's mandate to the whole country (UNSC, 2003).

As the conflict developed it became apparent that the opposition to the Afghan authorities, the US Army, and ISAF was growing. An increase in attacks targeted against the government and the international forces signalled a growing insurgency and a revival of the Taliban. The US Army's retreat after the removal of the Taliban had given the organisation an opportunity to regroup and recruit before returning to Afghanistan. The US Army had stated that they would not stay and start the process of nation building in Afghanistan. Now, more than 10 years later state building is part of the main strategy of winning Afghan hearts and minds. The trend of a growing insurgency has since continued, and reports from media, international forces and NGOs show that security in Afghanistan is not improving (Guardian, 2011). Rather, the situation seems to keep deteriorating. Intending to transfer responsibility to the Afghan authorities, the international forces have announced that they will begin their withdrawal from Afghanistan in 2014. The Norwegian Ministry of Defence has stated that the Norwegian armed forces will be out by the end of 2013. The situation after 2014 remains uncertain, as there has been made no concrete plans as to how many soldiers will remain for mentoring purposes after 2012, and for how long. Although NATO has made it clear that they are "[...]

clearly committed to supporting Afghanistan beyond 2014” (NATO, 2012), and that resolving this issue will be a top priority on the 2012 Chicago summit in May 2012, Afghanistan is facing an uncertain future.

3.2 Identifying structures and actors

There are two on-going military operations in Afghanistan, Operation Enduring Freedom Afghanistan (OEF-A) and the NATO-ISAF operation. In addition to these, personnel from the UN operation UNAMA are also present in most regions of the country. As all these three have different mandates, or in OEF’s case no formal UN mandate at all⁸, the relationship between the operations is somewhat blurred⁹. This section will give an overview of the most important actors, both those supporting the Afghan authorities, and those in opposition to it.

3.2.1 Actors supporting the Afghan government

The ISAF operation has 129 895 personnel and troops from 50 participant countries in Afghanistan as of January 2012¹⁰, the US Army being the largest contributor with approximately 90 000 soldiers. For administrative and strategic purposes they have established five regional command centres; north, south, east, west and central command. These regional command centres are again divided into Provincial Reconstruction Teams (PRTs), 28 in total (ISAF, 2012). PRTs are units which have the stated purpose of helping secure a more peaceful environment in the region which they are based and improve the possibilities for economic development. They have however been criticised for having too much focus on the military aspects of the operation, being unable to effectively cooperate and communicate with NGOs and the UN (Abbaszadeh et al, 2008). The PRTs are administered by COMISAF, which is based in Kabul.

According to NATO and the UN, the ISAF operation has two purposes, to keep order and security, but also to train the Afghan National Army (ANA) and assist them on their missions. The aim is that the Afghan government, its army, and its police forces will be able to handle

⁸ The US and the coalition acted according to the UN charter art. 51, but has later been directly acknowledged by the UNSC through resolutions concerning the ISAF operation.

⁹ The UNAMA mission is purely a monitoring and assisting mission consisting mainly of civilian staff.

¹⁰ Numbers vary from day to day and should only be indicative.

the country's security issues alone when US and NATO forces withdraw. The mission has therefore had an increasing focus on "partnering" since 2009, meaning that ISAF's responsibilities has shifted from peace keeping, to assisting the Afghan National Security Forces (ANSF) in their missions (NATO¹¹). Whether this has been a success or not is yet to be seen, but the fact is that domestic politics in Afghanistan is not making it an easy task for the Afghan authorities. Different ethnic groups, local tribe leaders and power brokers are all adding up to this complex situation. In order to transfer the security responsibility to the Afghan authorities huge efforts are being made towards recruiting and training ANA and the Afghan National Police (ANP). Both ANA and ANP reached their targets of respectively 171 600 soldier and 134 000 policemen by October 2011 (NATO, 2012, Livingstone & O'Hanlon, 2012). The number of ANSF¹² in February 2012 amounted to 336 806 (Livingstone & O'Hanlon, 2012). These are now operating with the assistance of ISAF under the NATO Training Mission program Afghanistan (NTM-A).

3.2.2 Actors in opposition to the Afghan government

The opposition mainly comprises three groups, the Taliban, the Haqqani, and Hezb-i-Islami. These are indigenous groups with loosely hierarchical structures that are heavily dependent on a civilian support network for supplies, recruiting, and intelligence and information campaigns (Jones, 2006). Al-Qaida comes in addition to these groups. Compared to the Taliban, the Haqqanis, and Hezb-i-Islami, they are organised in small units with little organisational structure (Burke, 2004). Al-Qaeda members often come from neighbouring countries such as Pakistan, Tajikistan and Uzbekistan, countries where they also train. While the Taliban, the Haqqanis, and Hezb-i-Islami seek to overthrow the current government, al-Qaeda first and foremost seek to drive away all western influence in Muslim countries.

In addition to these groups, there are a great number of local tribes which all have different interests and motivations. Warlords and Mujahedins remain strong players in Afghanistan, and are often motivated by economic profit and power positions. These players though, are not always in opposition to the state, as they are often given important positions within the

¹¹ Tactical directive known as *Partnering directive* released by General Stanley McChrystal, COMISAF/CDR USFOR-A on 29 August 2009. No longer available online.

¹² The ANA and the ANP make up the ANSF.

political system. The problem is, that they often do not manage, or are unwilling to, to fulfil the tasks that are embedded in these positions (Schetter et al., 2007).

3.3 Mandate and mission

The initial purpose of ISAF was to help the Afghan authorities to maintain peace and security in the Kabul region. The mandate based on the UN charter chapter VII was established in the UNSC resolution 1386 upon the request from the Afghan Transitional Authority and authorises ISAF to take all measures necessary to fulfil their mandate. In 2003, the UNSC resolution 1510 expanded ISAF's mandate, allowing the forces to expand their mission to the whole of Afghanistan. ISAF's mandate has since been renewed every year by the council¹³.

According to NATO, ISAF's mission is to

“... reduce the capability and will of the insurgency, support the growth in capacity and capability of the Afghan National Security Forces (ANSF), and facilitate improvements in governance and socio-economic development in order to provide a secure environment for sustainable stability that is observable to the population” (ISAF, 2012).

More precisely this means that the ISAF mission is threefold. First of all their mission is to support the Afghan Government in maintaining peace and security i.e. counterinsurgency operations. Secondly, they are responsible for mentoring and training the ANSF, ANA and the ANP. These tasks are conducted by the Operational Mentoring and Liaison Teams (OMLTs) and Police Operational Mentoring and Liaison Teams (POMLTs) through the NATO training mission in Afghanistan (NTM-A). The NTM-A is part of the NATO strategy adopted at the NATO Lisbon summit in 2010 stating that NATO forces would withdraw from Afghanistan by the end of 2014. Thirdly their mission is to assist in humanitarian relief programs when requested to do so by the Afghan government (Taylor, 2011).

¹³ See UNSC resolutions 1413, 1444, 1510, 1563, 1623, 1707, 1776, 1833, 1890, 1943, 2011.

3.4 The Norwegian contingent

Considering the United States and NATO as its closest allies, Norway was one of 21 nations that contributed with military equipment and personnel to Operation Enduring Freedom in 2001. In 2002, when ISAF was established at the Bonn summit in December 2001 deployed, the Norwegian Parliament decided to contribute to this operation too. After the 2005 national elections however, the newly elected social-democratic government withdrew the Norwegian OEF contingent choosing instead to increase its commitment to the NATO-ISAF operation (Stoltenberg, 2005). Today the Norwegian contingent consists of approximately 500 men and women from the Norwegian Armed Forces. A great number of them are stationed in Maymanah in the Faryab Province (Regional Command North) while a smaller number are stationed in Mazar-e-Sharif at the RCN headquarters and in Kabul (Forsvaret, 2011). The northern part of Afghanistan has been considered calmer than the southern part which borders to Pakistan, and international forces from both operations have encountered more resistance there.¹⁴ Although having been requested by NATO allies, the Norwegian Government and the Norwegian Army have decided not to send Norwegian troops to South-Afghanistan, supposedly because the government wanted to shift focus towards a more humanitarian approach (Forsvarsdepartementet, 2006b, Aftenposten, 2006).

When NATO assumed leadership of the ISAF operation in 2003, the Norwegian contingent was given responsibility for the Provincial Reconstruction Team (PRT) Maymanah in the Faryab province in North Afghanistan. They are currently cooperating with forces from Latvia, Macedonia and the United States. The Norwegian Army has been deployed in Afghanistan for more than ten years, and the environment in which they operate has changed dramatically over the last years as the insurgency has grown. The region has seen an increase in attacks by insurgent groups; the first quarter of 2011 saw a 45 per cent increase in insurgent attacks compared to the same period in 2010 (Landinfo, 2011). Ten Norwegian soldiers have so far lost their lives while on duty in Afghanistan, the largest number of losses for the Norwegian Armed Forces in an armed conflict since the Second World War.

¹⁴ The south-east part of Afghanistan, and especially the city of Kandahar, is regarded as the Taliban “heartland”. See <http://www.nytimes.com/interactive/2010/09/12/world/asia/20100912-afghan-indicators.html>.

3.5 The nature of the conflict

The 20th Century saw the emergence of what has been termed “total wars”. Wars that involved advanced and destructive weaponry and that affected whole societies. Total wars had an end goal different to what we see in wars today. Military victory would lead to a peace settlement. The 21st Century has so far seen the re-emergence of guerrilla warfare, a type of war where military victory alone will not lead to peace. There is no denying that that western armies have most experience and have mostly been trained for large scale modern wars since the end of World War II. The Cold War called for a conventional army that could counter an attack from the Soviet Union. Few western armies therefor had recent experience from unconventional wars when they entered into Afghanistan. Changing the Cold War “mind set” has therefore been necessary in most countries’ armies. Below, I will describe the type of conflict ISAF is fighting in, as well as give an account of the strategic choices the international forces have taken. I will argue that the type of conflict becomes particularly relevant when discussing the applicability of the principle of discrimination and vice versa.

The term asymmetrical war is often used when referring to the Afghanistan conflict. When referring to an asymmetrical war, it is often spoken of as a conflict with large discrepancy between the parties, either in terms of technology, professionalization of the army or strategic thinking (Rodin, 2006:154). In an asymmetric conflict, there are often no clearly defined lines between who belongs to what group; there should however be a distinction between whether one is participating in a conflict or not (Gross, 2010:40). This touches on the issue of how to classify combatants. Turner Johnson (2006:660) emphasises that one should not distinguish between groups in terms of what they are; rather, a distinction should be drawn based on how they act. This is a very important point when considering the conflict in Afghanistan, as the ISAF forces are not fighting a regular army, but an actor who does not necessarily comply with international law. It is therefore natural to assume that since the enemy is not wearing a uniform or other signs indicating their affiliation with an organisation, a person’s behaviour becomes important when determining whether he is a combatant or not (Gross, 2010:39).

3.5.1 Insurgency and counterinsurgency

As the opposition to the Afghan authorities and the ISAF mission has grown, the conflict has evolved into a conflict of insurgency. In short, an insurgency is “a popular movement that

seeks to overthrow the status quo through subversion, political activity, insurrection, armed conflict and terrorism” (Kilcullen, 2005:603). To achieve this they use political, religious, economical and informational means. A counterinsurgency then, is the authority’s tactics and means to counter and defeat the insurgents. Counterinsurgency is an effort to use all means available to try to sustain the authority’s legitimacy and further establishment (US Army FM 3-24, 2006:1-1).

During the first years of the war, the Taliban were low in numbers and most had fled the country settling in neighbouring states, especially in mountainous areas in Pakistan bordering on Afghanistan. Most western military armies are trained for conventional warfare, and few have experienced insurgencies before. As the number of insurgents started to grow in 2003-2004, NATO had to adapt strategies to fight “new wars”. The following section will address one of these, the strategy of counterinsurgency.

3.5.2 Strategic thinking in Afghanistan – COIN and hearts and minds

It has generally been argued that conflicts that develop into insurgencies demand a different approach to strategic thinking than conventional wars. Fighting insurgency conflicts have not been common for western armies in recent years, and their experiences are limited to the British Army’s participation in Northern Ireland and the US participation in the Vietnam War. Thus, most Western armies have been trained for conventional wars, not irregular warfare. The initial attack on Taliban in 2001 was in fact a conventional one. But, as the US Army withdrew after having toppled the Taliban regime, the Taliban regrouped and an insurgent started to develop. Lack of success at keeping the insurgents at bay led to a change of tactics from the international forces. In 2006 the US Army released *US field manual FM3-24 Counterinsurgency*. This manual accentuates the importance of legitimacy in counterinsurgency wars. This echoes David Galulas’ work on counterinsurgency warfare from 1964 arguing that the battle for the people is the most important one in counterinsurgency wars (Galula, 1964:4). Winning the peoples support and trust is the key to success it is argued, and the counterinsurgents strive to obtain this trust whereas the insurgents try to undermine the peoples’ trust in authorities.

Although not explicitly stated in field manuals and military doctrine, the concept of “winning hearts and minds” has become an important part of COIN strategy. It has featured

prominently in public statements by military leaders and politicians as well as in the media (Egnell, 2010:283). The overall strategy of “hearts and minds” aims to secure the local population’s support by using “softer” means and alternative military tools to gain legitimacy from the local population. Although activities associated with a “hearts and minds” strategy might lead to better living conditions, it must not be forgotten that such tactics are definite actions to achieve legitimacy for the military operations, both at a local and, often, international level.

Egnell (Ibid: 288-292) has categorised the “hearts and minds” strategy into three categories; activities within humanitarian and development aid field, conduct in military operations, and information-gathering operation tactics. The second category is the most relevant here. The most important tactic, he says, is the minimum use of force, and the protection of civilian life and property. In such situations, force protection is regarded as counterproductive as it creates a distance between the forces and the local population.

Such tactics in warfare have altered the requirements of soldiers as their roles have shifted toward more complex tasks. As such, COIN operations differ dramatically from the concept of total war. The new role of military personnel can be illustrated by the following quote:

“COIN operations require officers who are effective soldiers and who can think strategically, who know the history of previous COIN operations and who can communicate clearly in the diverse situations in which they find themselves. They also require a solid grasp of the ethics required to fight a successful campaign” (Deakin, 2009:122).

The expectations of today’s soldiers are higher, and their roles more difficult as they are constantly facing new, and perhaps previously unknown, situations. Tackling such a diversity of tasks requires good ethical training, as ethical choices are not only important for the given situation, but for the whole operation as a whole. The forces’ responsibility to follow such a strategy was accentuated by General Stanley McChrystal’s tactical directive from July 2009.¹⁵

¹⁵ Available at http://www.nato.int/isaf/docu/official_texts/Tactical_Directive_090706.pdf

4 Just war theory and analytical framework

Just war theory is a tradition of thought that seeks to define when war is morally justified, and the moral limits to the use of force in war (Johnson, 2000:422). The ethics of war are important because it defines what is morally right to do in war, and what is not. For those participating in armed conflicts, having such guidelines is important as they influence how the participants act in certain situations. Furthermore, ethics and good conduct in war decides what kind of peace there will be (Ibid.:447). This chapter will take a closer look at just war theory, and I will apply this theory as an analytical tool on my chosen case, which is the principle of discrimination in Afghanistan. I will first give an introduction to just war theory, the principle of discrimination, and the importance this principle has in international law and just war theory. I will then look at four important criteria found in just war theory for distinguishing between combatants and non-combatants; group affiliation, clothing, constitution of a threat, and vulnerability. Furthermore, I will discuss how these criteria can be operationalized in Afghanistan. The last part of the chapter will introduce an analytical framework which will be used to analyse the empirical data.

4.1 Just war theory

Just war theory places itself between the Realist approach and the Pacifist approach to war. While pacifists reject all forms of war, arguing that there are no moral grounds to go to war, realists hold that morality has no place in the practice of war, or international relations in general. Morality, they argue, interferes with the inherent self-interest of nation states (Coates, 1997:17-20). Just war theorists on the other hand argue that war is an evil, but sometimes a necessary evil. This leads to the argument that once war happens, certain moral ground rules should be applied (May, 2007:2-8). The theory seeks to explain what these moral rules are, and how they can be justified. Nabulsi (2006:44) argues that the different strands of thought within just war theory might explain the various military cultures that we see today. The problem, she says, is that the theory never agreed on the issue of whom the moral rules apply to, meaning that the boundaries for the terms combatants and non-combatants have never

been resolved. This is problematic as undefined groups make it hard to decide who belongs to which group. Some might therefore be left in an ethical grey area, not knowing which rights and obligations they have, as their affiliation to a group is not clear.

There are two sets of principles in just war theory; the first one concerns going to war, *jus ad bellum*, and the other one conduct in war *jus in bello*. The principle I will be discussing, the principle of discrimination, belongs to the *jus in bello* phase of war. *Jus in bello* has been debated for as long as war has existed and the idea of rules in war can be found in writings dating back to ancient Greece. In *The Republic* for instance, Plato argues that good conduct in war is important as it would make it easier to reconcile with the enemy once the war ended (Whetham, 2011:68). Originally, the distinction between combatants and non-combatants did not necessarily consider the atrocities of war as the key issue, what they were concerned about was rather the implications the army's conduct would have for politics later on. It was not until the 19th and 20th Century that the human rights perspective became codified as law. Although largely considered as a western tradition of thought today, just war theory has roots in both Islamic and Indian traditions. In fact, *jus in bello* and the protection of non-combatants was debated in the Islamic tradition as early as the Eight Century, whereas it did not become an important part of the western tradition until the 18th Century when International Humanitarian Law started to evolve (Sorabji, 2006:14).

4.2 Defining key actors in war

The principle of discrimination in just war theory rests on the assumption that it is possible to distinguish between different groups in war, most notably combatants and non-combatants (May, 2006:39). However, before I proceed to the principle of discrimination, there are some key terms that need to be defined. Both international humanitarian law and just war theory use the terms combatants, non-combatants, soldiers and civilians when referring to actors in war. These terms are not always easily distinguishable from each other, neither are they used in the same way in IHL and JWT; I will therefore give some definitions of these key terms below.

Combatants

According to international humanitarian law a combatant is “all members of the armed forces of a party to the conflict”. Combatants are the only actors who can legally use force in war, but this right also entails that they lose their immunity against being attacked. As I will elaborate below, Walzer (2006:144-146) goes further in his definition of combatants and includes all those whose work directly contributes to the war effort in the term combatant.

An armed opposition or other organized armed groups are not legally regarded as combatants, but past practice indicates that they do not enjoy the same privileges as civilians do. Thus they lose their right to be shielded from directly targeted attacks by partaking in an armed conflict (ICRC, 2012).

Soldiers

The terms soldier and combatant are often used interchangeably when referring to armed conflicts. However, a soldier may become a non-combatant when being injured or taken prisoner. A soldier who is part of the medical staff, or the pastoral services is a non-combatant. I will use the terms “soldier” and “combatant” in this thesis, as is also the case in just war theory.

Civilians

Civilians are according to international humanitarian law, everyone who is not part of the armed forces. Civilians are protected from direct attacks unless they are taking part in the hostilities. Those who do take part in the conflict are regarded as unlawful combatants and do not have the right to immunity from prosecution if captured. Civilians who accompany or assist Armed Forces are not liable for attack, and neither do they have the right to use force. They should nonetheless accept the risks of being close to a military target, or a target associated with the war effort (Dahl, 2003:71).

Non-combatants

In IHL, non-combatants are persons who are at all times protected against attacks. This includes medical and religious personnel who are part of the armed forces. In just war theory, non-combatants may also refer to civilians.

It is not my intention to enter into the legal discussion of whether the armed opposition in Afghanistan should be regarded as a lawful combatant or not. I will refer to them as combatants, as one of the purposes of this thesis is to explore how the Norwegian Armed Forces apply the principle of discrimination in the conflict. I will now turn to the principle of discrimination and how this is formulated in IHL and JWT.

4.3 The principle of discrimination in international humanitarian law

One of the core principles of warfare is the principle of discrimination. It became part of International Humanitarian Law in 1977, when the additional protocols of the Geneva conventions were ratified, and it states that:

“The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians” (ICRC, 2005).

Its intention is to distinguish those who are liable for attack from those who are not, as well as those who are allowed to use force, from those who are not. It especially prohibits direct attacks against civilian targets (Gordon, 2010). The principle of discrimination is codified in Articles 48, 51(2) and 52(2) of Additional Protocol I to which no reservations have been made (Henckaerts & Doswald-Beck, 2005). The problem is that the signatories are nation states, and not all armed groups identify themselves with a state, and for that reason do not necessarily feel responsible to international law.

4.4 The principle of discrimination in just war theory

This ancient tradition of thought has its roots in writings by philosophical and political writers such as Aristotle, St. Augustine, Thomas D'Aquinas, and more recently Michael Walzer. The traditional interpretation of the theory is that soldiers must distinguish between combatants and non-combatants in war. Although agreeing on this, they disagree as to which basis to

draw this distinction, and today, this is one of the key debates within the theory. How to make this discrimination has therefore become one of the key issues in just war theory. May (2007:97) states that in order to be able to distinguish one group from another, one has to take both normative and conceptual considerations into account. Contemporary definitions of groups and norms must therefore be taken into account when drawing such a distinction. When doing this, discriminating soldiers from civilians in a conflict such as the one in Afghanistan becomes more complex because of the overlapping characteristic between the different groups. Another problem with the idea of dividing actors into groups is that groups are not constants. Members may join or quit the group at any time, and the question then is at what time a person should no longer be regarded as part of a group? If group-affiliation is based on a member possessing a certain asset, must a person lose or give up this asset required for participation, or is it enough that the person in question denies affiliation with the group? This is particularly relevant for the situation in Afghanistan as the line separating insurgents from civilians such as farmers is unclear.

In what Walzer calls the war convention he argues that non-combatants cannot be attacked at any time. "They can never be the objects or the targets of military activity", Walzer argues (2006:151). He thus holds that all non-combatants are innocent and should be protected. He argues that care should be taken to ensure that non-combatants are not harmed. These measures involve that combatants should take risks, endangering their own lives if necessary, to avoid harming non-combatants (Walzer, 2006:152). According to this view soldiers have rights, but also obligations.

This last point is especially important for the situation in Afghanistan. How long should a soldier wait until he fires if he feels threatened? Does the obligation of protecting civilians supersede the right to self-defence? According to Walzer, soldiers should put their lives at risk to avoid harm to civilians. If applied in insurgencies, should the soldier then put his own life at risk and withhold his fire until he is absolutely sure that the individual in question is not carrying hand weapons or explosives? And, what happens in a situation where the enemy is consistently ignoring international law and IHL in warfare? Will they succeed in their tactics? In my discussion, I aim to answer these questions in light of recent just war theory

4.5 Four criteria for distinguishing combatants from non-combatants

The most important contributor to just war thinking in recent times is Michael Walzer. His book *Just and Unjust Wars* (1977) has made a huge contribution to the debate about ethics and morality in war in the late 20th and early 21st Century. Walzer draws a distinction between combatants and non-combatants, and between soldiers and civilians; his distinctions however are not without problems, as I will show in the coming paragraphs. I will now outline four criteria that can be used to discriminate combatants from non-combatants; group - affiliation; the constitution of a threat; vulnerability; and clothing. The next paragraphs will give an introduction to these criteria and how just war theorists see them.

4.5.1 Group- affiliation

The first criterion, group- affiliation, has been thoroughly discussed in what Michael Walzer's calls "the War Convention". Walzer believes that the rules of war are important, not only because it protects non-combatants, but also because they give soldiers a reassurance that their actions are morally justifiable in war. The meaning of the War Convention is thus "...to establish the duties of belligerent states, of army commanders, and of individual soldiers with reference to the conduct of hostilities" (Ibid.). One purpose of the thesis is to see how this plays out in Afghanistan.

According to Walzer (2006:144) a soldier is someone who belongs to a state army and has gone through the training of such an army and thus constitutes a threat to his or her surroundings. The first principle of Walzer's war convention is "*once war has begun, soldiers are subject to attack at any time unless they are wounded or captured*" (Ibid. 38). This can be linked to the Geneva Conventions stating that those hors de battle; medics, prisoners of war, wounded combatants and religious personnel are not to be attacked. Attacking soldiers, however, is according to Walzer (2006:144) justified as they have allowed themselves to be made dangerous through military training and the provision of weapons. Walzer (Ibid. 46) draws a distinction between soldiers at rest and soldiers in combat, thereby acknowledging that there are different shades to the group soldiers. He holds that the latter poses a graver threat than the former; but that even soldiers at rest pose such a threat that they must be classified as combatants nonetheless.

Walzer's idea that even soldiers at rest must be classified as combatants has great implication for the situation in Afghanistan. His idea implies that combatants can be attacked at any time, and not only when they are taking part in hostilities. Identifying and distinguishing social groups, however, can be very difficult as they are not constants. People might belong to a group when performing a particular task; such as working in a munitions factory, but does not belong to the group "combatants" when not at work (May, 2007:97). Walzer has a certain notion of what is needed to belong to a group. First of all signing up for membership is one way of separating those who belong to a group from those who do not. The problem however, is whether it is possible to distinguish someone who has signed a membership to a group from someone who has not. Another problem is members leaving the group, how can they be distinguished from the members once they have left it? In the case of a soldier, Walzer argues that a soldier cannot leave a group because a trained soldier would always be dangerous and would therefore always be liable for attack (May, 2007:99-103).

What, then, is needed to "become a member" of the group "combatants"? Can the armed opposition in Afghanistan be classified as combatants? And if they can, does this entail that they remain combatants, even if they work on their crops one day? According to Walzer, as seen above, someone becomes a combatant once he has entered, voluntarily or not, into a group and has been through military training. This entails that such a person also can be liable to attack if he works the crops one day. Walzer's problem, though, is, as mentioned above, how to distinguish those who have left the group from those who have not. Using this criterion is thus very difficult, especially in Afghanistan, where signs of group- affiliation is even more absent than in conventional warfare, as the armed opposition does not wear visible signs of their affiliation. Walzer's argument that all members of a group are to be treated the same indicates a rough-grained approach to the principle of discrimination; an approach which I will argue is not applicable in all conflicts.

As described above, drawing a distinction between combatants and non-combatants in terms of group- affiliation is problematic. The next criterion for discussion will turn to whether drawing a line based on clothing, is a better way of distinguishing combatants from non-combatants.

4.5.2 Clothing

A second criterion on how to identify combatants can be by looking at their clothing and equipment. Soldiers are according to IHL required to wear a uniform, or other signs that can identify them as a combatant, as long as they are taking part in hostilities. The use of uniforms allows armies to direct attacks against the opposite side and at the same time protect everyone else (Gross, 2010:38). In certain wars, however, the use of uniforms may be an unfair disadvantage for one party. This is the case in guerrilla wars. Additional Protocol I to the Geneva conventions (1977) opens up for guerrilla warriors to shed their uniforms when fighting an army of occupation (Gross, 2019:36). Combatants are obliged to distinguish themselves from civilians, but if they cannot do this by wearing uniforms as the situation is in a guerrilla war, then they must do so by openly carrying their weapons during military operations (Ibid.). The situation in Afghanistan is comparable to a guerrilla war. Yet, the armed opposition is not following these rules. ISAF is then put in the difficult situation of having to use other criteria to identify combatants, and to distinguish these from non-combatants. This might lead to them mistakenly targeting civilians, or put them self in a greater danger of harm as they are not able to recognise threats.

4.5.3 The constitution of a threat

The third criterion I will consider is the constitution of a threat. This criterion is the second answer Walzer (1977:43) gives in his discussion of the principle of discrimination. He says that a non-combatant is someone who is not currently engaged in warfare. Walzer uses the story about the naked soldier to problematise the distinction between combatants and non-combatants. He imagines a soldier who is unaware that he is being watched take a bath in a river. The enemy soldier can shoot him at any point. Walzer discusses whether the soldier has a right to shoot him, as he is obviously not participating in the war at that moment. He will however participate as soon as he is done, and will then again constitute a threat to the soldier who is watching. Walzer raises the question whether it is legitimate to attack a soldier regardless of the situation. If a soldier is not posing a real threat, is it still morally justifiable to attack? This is his starting point for the discussion for when a soldier becomes a combatant. As individuals enter the military and become part of a group as soldiers, do they thereby lose their right of not being attacked? Or are there situations in which killing a soldier is wrong? Walzer argues that because he will represent a threat again, killing him is permissible, but not

necessarily right morally speaking. It can therefore be argued that Walzer's view is that group-affiliation should be a criteria for drawing a distinction between combatants and non-combatant, not whether they constitute a threat or not. This argument is based on Walzer's thought that being a soldier entails being part of a standing army that have gone through the training of such an army has formed soldiers into dangerous men and women. This further confirms Walzer's rough-grained approach to the principle of discrimination.

May (2007:112) argues that taking a fine-grained approach will better grasp both the conceptual and moral intuitive idea of who is liable for attack or not. He therefore advocates that a distinction based on *how people act is better than which group people belong to*. A member of the Afghan armed opposition is likely to be trained, and as part of their tactic is to hide among civilians, the fact is that the person is a threat to ISAF, but does the principle of discrimination require a rough-grained, or fine-grained approach? Customary International Humanitarian International Law (IHL) is important here, as it covers individuals' rights that are not fully covered in laws concerning international and non-international armed conflicts (ICRC, 2010). Thus, there is an overlap between just war theory principles, the Geneva Conventions and Customary International Humanitarian law, but there are also discrepancies. These discrepancies are highly relevant for my case as they address the question of what happens when one part of the conflict does not respect these laws, but uses the other parts commitment to them as part of their tactics?

If the armed opposition is taking part in hostilities, but has neither been organised nor trained as an army; does this entail that the armed opposition should be treated as part of the group non-combatants? If so, then very few of those who do partake in hostilities in Afghanistan, or are affiliated with a group which does, can in fact be regarded as combatants as the armed opposition lacks both a clear leadership and co-ordination amongst them. This could be the consequence of choosing Walzer's approach. May's idea of a fine-grained approach, deciding who are combatants and who are not on a case-to-case basis, could eliminate this problem.

The problem with May's suggestion, however, is when a person goes from being a non-combatant to becoming a threat. A combatant dressed as a civilian, carrying explosives constitutes such a threat, but identifying him is difficult. Thus is it not necessarily easy to make a distinction on a case-to-case basis. This example is one of the difficult situations Norwegian Armed Forces are encountering in Afghanistan, situations in which enforcing the principle of discrimination is very hard.

4.5.4 Vulnerability

Goodin (1985) defines vulnerability as [...] essentially a matter of being under threat of harm [...]. In Afghanistan, such a definition of vulnerability would lead to a too large group of non-combatants. As noted, May (2007:172-176) argues for a fine-grained approach, as this would allow distinguishing on a case-to-case basis between those who constitute a threat and everyone who does not constitute a threat; hence vulnerability would in many instances apply to soldiers on both sides, and define them as non-combatants. More specifically, the great asymmetry between the parties in terms of equipment could lead to the insurgents being defined as vulnerable, and thus as non-combatants. The principle would offer a stronger protection to both civilians and soldiers. At the same time it would expose combatants to greater danger as their obligations towards non-combatants grew. A more “humane treatment”, as May calls it, would thus spare more lives. Although Walzer agrees that soldiers should expose themselves to greater danger in order to protect civilians, he would still hold that persons not constituting a danger there and then, may become a threat towards the soldier later and is therefore liable for attack. Considering vulnerability as a criterion may therefore be unreasonable with regard to accomplishing military goals. As will become clear in the analysis, neither of the informants mentioned this as a criterion for distinguishing combatants from non-combatants.

4.6 Just war theory and customary international humanitarian law

Rules of conduct in war differ according to what type of conflict one is dealing with. In 2001, as a response to the 9/11 terrorist attacks the US launched “Operation Enduring Freedom” on October 7 against Al-Qaeda and Taliban. This phase of the war, lasting until 18 June 2002, has been coined as an international armed conflict. When the international community recognized the Afghan Transitional Authority (ATA) on 19 June 2002 as the Afghan authority, the conflict was no longer between two states and hence no longer an international armed conflict (Geiss & Siegrist, 2011). The parties of the conflict, that are; the Afghan Transitional Authority with assistance from OED forces and ISAF, and the armed opposition, are therefore fighting in a non-international armed conflict. The rules concerning rights and

obligations in a non-international armed conflict are stated in Common Article 3 of the Geneva Conventions of 1949, the Additional Protocol II of 1977 and Customary International Humanitarian Law applicable in such a conflict (Geiss and Siegrist, 2011:13-16)¹⁶. In recent years, there have been more non-international conflicts than international conflicts. Most laws were, however, made for international conflicts, and therefore the laws concerning non-international conflicts are not as strong and extensive as those for international conflicts. This has made customary international humanitarian law (IHL) even more relevant in non-international armed conflicts. International humanitarian law is important in two regards; as not all nation states have ratified all treaties, or parts of treaties concerning the rules of war, they are still bound by customary international law. This means that there at least in principle are consequences for violating human rights¹⁷. IHL also strengthens the rights and obligations of belligerents fighting in a non-international armed conflict.

The International Committee of the Red Cross has conducted a study to map out the rules of customary international humanitarian law (Henckaerts, 2005). The principle of discrimination is amongst those rules that the International Committee of the Red Cross (ICRC) found to be part of customary IHL. This principal and other principals that concern the discussion of civilians and combatants that are relevant for this thesis are listed below

- The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians.
- Acts or threats of violence of which the primary purpose of which is to spread terror among the civilian population are prohibited.
- Civilians are persons who are not members of the armed forces. The civilian population comprises all persons who are civilians.
- Civilians are protected against attack, unless and for such time as they take a direct part in hostilities.

¹⁶ In addition to these there are treaties concerning different aspect of war, such as the ban on cluster munitions, which came into power in 2010.

¹⁷ The power of the International Court of Justice is disputed, as the UN system does not have the means to enforce international law.

People may be associated with a group based on status, or on behaviour. Walzer views the group “combatants” as status-based rather than behavioural according to May (2007:172). In Afghanistan, operating with a status-based approach to the term combatant will be problematic. The armed opposition in Afghanistan is from time to time unidentifiable as they blend in with the civilian society, and it is hard to distinguish who is participating in the hostilities from those who are not. What it means to participate is also unclear and this is a central question concerning the issues of combatant and non-combatants in just war theory. Gross (2010:45) argues that in asymmetrical war the focus is not so much on the groups, but on the individual and the threat he or she poses. In such conflicts, do the stronger party have special responsibilities vis-à-vis the other party? Johnson (2000:59) does not call it special responsibilities, but he does argue that from a moral point of view that counterinsurgent forces have a duty to restrain their actions according to international law, even though insurgents fail to do so.

4.7 Analytical framework

Based on the just war tradition presented above, this section of the chapter will outline an analytical framework for answering the research questions, namely

- 1. Whether it is possible to distinguish combatants from non-combatants in Afghanistan, and*
- 2. Whether it is possible to prepare soldiers for the task of drawing this distinction.*

In international humanitarian law a distinction between combatants and non-combatants is drawn between civilians and combatants, where civilians are all those who are not members of the Armed Forces. If Norwegian Armed Forces are to follow IHL, then they must be able to distinguish those who are member of the Armed Forces from those who are not. In the conflict in Afghanistan, Norwegian Armed Forces are not fighting a regular army; they are fighting an insurgency consisting of several opposing groups that are more or less organised and connected. Assuming they can apply the same indicators to identify combatants as if these were members of an Army, they should be able to identify them by the following according to international law: uniforms and membership of an armed group – this might for instance entail carrying weapons openly as guerrilla groups are required to by international law.

As outlined in section 4.5, The principle of discrimination in just war theory, four criteria can be established for identifying combatants in JWT: group- affiliation, vulnerability, the constitution of a threat, and clothing. Walzer and May differ in how best to draw this distinction and end up with two different ways of doing this. According to the interpretation of Walzer I abide to here, Walzer claims a group-based approach is best for distinguishing between combatants and non-combatants, whereas May advocates a more fine-grained approach, namely drawing a distinction based on behaviour. Walzer's notion of the term combatant is therefore broader than May's, who believe that as long as there can be no good way of defining social groups, this should not be used as a criteria for deciding who are liable for attack, and who are not. Drawing on these two approaches, two main groups of indicators can form the basis for how to draw a distinction between combatants and non-combatants: group-based and behaviour-based indicators. Group-based indicators are uniforms and group membership. The behaviour-based approach has indicators such as constituting a threat, i.e. carrying weapons, and behavioural pattern such as popper activity. Based on these indicators and approaches, I have outlined four possible outcomes for research question one.

1. Norwegian Armed Forces use Walzer's approach and distinguishes between combatants and non-combatants based on group-based indicators. If this is the case, then it is possible to draw a distinction in the Afghan conflict. This will also entail that COIN operations are not that different from conventional warfare where the indicators of the group-based approach traditionally have been used to distinguish combatants from non-combatants.

2. Norwegian Armed Forces use May's approach and distinguishes combatants from non-combatants based on a behavioural approach. If so, this also implies that it is possible to draw a distinction, but that making this distinction in COIN operations differ from how it is done in conventional conflicts. This then becomes relevant for the second research question of whether it is possible to train for such conflicts.

3. A third possible outcome can be a combination of the two approaches described above where the soldiers use all, or some of the criteria, to draw a distinction. This will imply that it is possible to draw a distinction, but that the existing criteria in IHL are not sufficient to provide soldiers with guidelines to do this.

4. The last possible outcome would be that none of the criteria are being used, or can be used, in the conflict. Given the assumption that there are no other criteria that can be applied, this

entails that it is impossible to draw a distinction between combatants and non-combatants in Afghanistan, and thus will it be close to a realist's conclusion.

4.8 Concluding remarks

When one part of the conflict is consistently ignoring the rules of war in order to gain the upper hand, this can create a dilemma for the opponent. Should he fight the opponent with the means he has available without resorting to the same tactics, knowing that this will put him in greater danger, or should he resort to the same tactics, creating a negative spiral of ethical conduct? This is the situation in Afghanistan today where ISAF, bound to follow IHL fights the armed opposition who do not necessarily abide to the same rules. Faced with an opponent who is not recognisable by uniforms, ISAF soldiers must be careful in their assessment of who is an opponent and who is not. Killing someone who is innocent will have implications, not only for the individual committing the crime, but also for the mission itself, as these implications are closely linked to a successful tactic in asymmetrical warfare. This is something the armed opposition in Afghanistan knows, and take advantage of. The discussion above comes down to whether a person should be judged by his intentions and actions rather than status. The problem with the first alternative is that it is too contingent to form the basis of a rule, the problem with the second is that the group as a whole is responsible for acting even though the acts may only have been carried out by parts of that group. May's (2007:108-112) solution is that the distinction should be made based on how people act, but if it was possible to distinguish between groups as in whether they were morally guilty or innocent that option would be preferred.

5 Analysis

The analysis of the empirical data will be presented in this chapter, which is divided in two, one part for each of the two research questions. Drawing on the analytical framework constructed in chapter four “Just war theory and analytical framework”, I will first turn to how Norwegian Armed Forces distinguish combatants from non-combatants, and whether it is possible to make this distinction at all in the Afghan conflict. Here, I will examine the indicators described in chapter four, and see which ones the Norwegian Armed Forces are using. The second research question seeks to find out whether Armed Forces can prepare for moral dilemmas, and this will be the topic of the second part of this chapter. Some final remarks on the results from the analysis of both research questions will be offered at the end of the chapter before turning to chapter six “Conclusions and implications”.

5.1 Distinguishing combatants from non-combatants in Afghanistan

In section 4.7, where I outline my analytical framework for the thesis, I identify two groups of indicators that can be used to distinguish combatants from non-combatants in Afghanistan: group-based indicators, and behaviour-based indicators. The purpose of this section is therefore to map out which indicators the Norwegian Armed Forces are using, and which of these two groups, if any, the indicators fit into. Identifying such indicators is important, as this will point to whether international humanitarian law as it stands today is applicable in the Afghan conflict.

One of the question of how they distinguished combatants from non-combatants, four out of six informants responded that this could be done by looking at what a person was wearing, more precisely if the person in question had one of the following objects: maps, optics, and communication devices. This, they said, combined with contextual variables, could lead to a positive identification, and thus the right to open fire. Though enemy combatants are not wearing proper uniforms, the answers show that clothing is still a factor when distinguishing and identifying combatants from non-combatants. It can therefore be argued that one indicator the Norwegian Armed Forces are using is *clothing*.

Furthermore, the soldiers spoke of visible threats such as weapons and explosives. People carrying such items were perceived as threats, and thus used as a way of distinguishing between combatants and non-combatants. Nevertheless, a second indicator, whether someone *constitutes a threat* can be identified. This is a very difficult criterion to utilise as one soldier's perception of a threat might be different from another, something I will come back to in section 5.3, when I discuss whether it is possible to prepare the soldiers for the challenges they face when applying the principle of discrimination in Afghanistan.

People carrying items such as weapons or explosive devices as mentioned above can be perceived as a direct threat. I will therefore argue that a third main indicator can be identified: *behaviour*, a term I will describe as behaviour that can lead to a threat; thus is behaviour a sort of an indirect threat. The informants often spoke of context in interviews, and this indicator is closely connected to context. There are blurred boundaries between this criterion and the criterion of whether someone constitutes a threat. So-called "poppers"¹⁸ will lead to a positive identification of an enemy. Although possibly carrying objects as maps, optics, and communication devices these might not always be visible. Poppers are still regarded as a case of hostile intent. All six informants spoke of other peoples' behaviour as a means for distinguishing combatants from non-combatants in other settings, although in many circumstances this was only one of the factors leading to a positive identification. Such behaviour would be people observing them from a distance, people walking back and forth in "unnatural places", as one informant put it, and someone speaking on the phone frequently as if reporting to someone in a special setting. I will therefore argue that the Norwegian soldiers, at least partially, use an indicator of *behaviour* to distinguish between combatants and non-combatants.

From the empirical evidence collected for this study I have therefore identified three indicators for distinguishing combatants from non-combatants that are being used by Norwegian Armed Forces in Afghanistan; clothing; the constitution of a threat; and behaviour. These three indicators are a strong indication that it is possible to apply the principle of discrimination in the Afghan conflict, and this partially answers the first research question of the thesis. The next section of the chapter will take each of the above-mentioned indicators and see to what extent they are used by Norwegian Armed Forces in Afghanistan,

¹⁸ Insurgent scouts, often placed on top of hills or mountains.

and whether they are, alone, or in combination with others, able to make soldiers apply the principle of discrimination successfully.

5.2 Applying the principle of discrimination

Having identified three criteria in the previous section that the Norwegian Armed Forces use, I will now analyse the data material to find out if the indicators described in section 5.1, namely the *constitution of a threat*, *behaviour*, and *clothing* make it possible to distinguish combatants from non-combatants. This will lead to a final answer to research question one, whereby I will be able to identify which of the four possible outcomes described in section 4.7 that applies in this case.

One of the three criteria I discussed in the previous section was the *constitution of a threat*. This was the most important criterion used by the informants to identify combatants. May (2007) argued that the advantage of using such a distinction is that the soldier decides on a case-to-case basis, rather than treating everyone belonging to one group the same. This, May argues, requires that the soldier stops and think in every situation before he acts, something I will argue can both be an advantage and a disadvantage. Making the soldier think before acting surely is a good thing, but deciding on a case-to-case basis might also lead to wrong decisions, as there might be little or no time to reflect on the matter. In addition, there is also the question of how much responsibility that can be expected of a soldier when it comes to drawing such a distinction.

When asked how they identify combatants, four of the respondents I interviewed answered quite similarly. First of all, identification, they said, was always context specific. There would always be signs, circumstances that would make them suspicious. This could be everything from people walking restlessly back and forth, to people who seemed to be in places where they did not belong. Village streets going from pulsating to empty was another. Such signs, they argued, indicated that something was about to happen, or that there were insurgents nearby. The soldiers needed a positive identification that a person was a combatant in order to legally open fire. If a person attacked, that would be a positive identification, but the respondents also referred to objects such as weapons, communication devices, maps and binoculars as indicators for positive identification.

In situations where they would have a positive identification, the soldiers claimed that although having observed items such as those above, or feeling threatened, they often did not open direct fire at first. They would in many situations fire warning shots to be absolutely certain that it was an enemy combatant. For as one respondent put it: *“There is always that two per cent chance that it is a civilian”*. This statement entails that objects such as weapons, communication devices, binoculars, and maps as indicators of a positive identification, which according to ROE¹⁹ gave them the right to open fire, were not necessarily trusted as good indicators of insurgents. This may indicate that the criterion of *clothing* as a means of distinguishing combatants from non-combatants therefore is not applicable in Afghanistan.

One of the informants differed from the other informants on nearly all accounts. He gave an entirely different answer to the question of how he identified combatants. He stated that one simply cannot identify enemy combatants in Afghanistan. In other words, he found it incredibly difficult, something that the quote below illustrates.

“You can’t identify them before they have actually picked up their weapon and are shooting at you. There are circumstances that make you suspect that they are the enemy, but you can never be sure before they actually shoot at you. And, even then you can’t be sure they’re the enemy. In Afghanistan, it is very complex. How shall I put it (...) It is hard to map out who are the enemy, and who are not, because there are so many interests out there; people with local intentions. They can work with us, with the Taliban, with Al-Qaida, or (...) they don’t have any ideological thoughts behind their actions at all. They are power brokers [...]”.

The *clothing* criterion is closely connected with both the criterion of group-affiliation, and the criterion of whether someone constitutes a threat or not. Clothing can help separating people into groups and make it easier for soldiers to identify combatants. However, as the opposition does not wear uniforms in Afghanistan, objects and equipment are used as indication of a person being a combatant. This, however, does not make it certain that the person belongs to the armed opposition, as there are so many actors involved in this conflict. A man carrying a weapon might be part of a local militia and thereby have permission to carry it. This man may look exactly the same as an insurgent in terms of clothing. It is therefore difficult to argue that *clothing* as a criterion for drawing a distinction between combatants and non-combatants is

¹⁹ ISAF ROE are classified, hence is all information about ROEs in this thesis based on what informants have told me.

satisfactory. Clothing and objects can be helpful in identifying combatants in Afghanistan, but it cannot alone be used to draw a distinction unless soldiers do, as May (2007:97) argues they should, and take normative and conceptual considerations into account. The criterion must therefore always be seen in connection with context. The objects that the informants mentioned are normal equipment which is as likely to be utilised by non-combatants as combatants.

As seen above, there are differences between the informants in terms of how they perceive the difficulty of identifying combatants. I will argue that this is due to their different experiences in Afghanistan. One of the requirements for an informant to participate in this study was that he or she had been in combat situations in Afghanistan. All fulfilled this requirement, but the kinds of combat situations they had been in differed greatly. Those informants referred to above who mentioned objects and weapons as a way of distinguishing had compared to the other two informants not experienced close combat situation in which they had been forced to make split-second decision of whether a person constituted a threat or not. These four respondents had found drawing a distinction between combatants and non-combatants manageable. Although these situations were often context specific, the situations the respondents had been in often paralleled situations found in conventional warfare. The episodes the two other informants spoke, on the other hand, were situations characteristic for insurgencies. Based on this it can be argued that it was less complex to apply the principle of discrimination in situations resembling conventional warfare, than insurgencies. The fact that the soldiers often outnumbered the insurgents, and the attacks were often launched from a long distance, meant that they had more time to think and reflect on how to react to this threat than if the enemy was close by. As one respondent said; *“when we were attacked from such a distance I became more relaxed as the danger was not that high. We could stand upright and everything”*. A feeling of not being too close to the enemy, gave them better time to react and to communicate.

The same four informants as referred to above also argued that they had good guidelines to follow concerning the principle of discrimination, and that this contributed to overcome the challenges discussed above. But, if taking the statements of the two other informants into consideration these guidelines are good enough until a more difficult scenario appears. Thus, one can assume that these guidelines are not satisfactory for soldiers in Afghanistan, as they do not apply to all sorts of situations.

This does however contradict the previous claim that obtaining a positive identification of a combatant was not that much of a challenge. Another respondent claimed that one could never be certain, but that:

“What it comes down to, no matter what, is not what you are allowed to do, legally, but what you can live with. (...) And what is it that I can live with? (...) It has a lot to do with intuitive actions. One has to be sure that the intuitive actions one performs during a split-second coincide with those guidelines one has been given in the ROEs. If you visualise it over and over again before you deploy to an area of operation, then you know that you most likely, but one can of course never be certain, that your intuitive actions will coincide with those rules and guidelines. But it is hard, because you don’t normally have that much time to go through such reasoning before you have to make that decision”.

When unsure of whether a person was a combatant or not, the soldiers followed certain steps to make sure they took the right decision. By using hand signals, local languages and warning shots before actually opening directed fire, they hoped to identify who were combatants and who were not, when feeling threatened. Persons not responding on repeated warnings, including warning shots could be perceived as a threat, and any hostile actions towards such threats would be regarded as self-defence.

The respondents referred to the criteria of *clothing*, *the constitution of a threat*, and *behaviour*, but as can be seen from the analysis above it is not necessarily that the criteria they say they are using actually work in practice. The criterion of clothing for instance was second-guessed by the informants, as they would always fire warning shots before they were able to draw a distinction. It would however help them in some situations, but was then always seen in context with other circumstances. The two other criteria, *behaviour* and *the constitution of a threat* were more relevant for the soldiers as they would indicate threats, both indirect and direct threats. This leads to the conclusion that outcome three from section 4.7 is the outcome applicable in this case. I will return to the implications this has in chapter 6.

5.3 Is it possible to prepare for moral dilemmas in COIN?

In 2006 the Norwegian Armed Forces initiated a new plan for further integration of ethics in the Ministry of Defence and its underlying department services. As seen below, the plan pointed towards a stronger focus on ethics within the field

“Dilemma training and the integration of problems of an ethical and attitudinal character in exercises and projects, are useful means to prepare leaders, co-workers, and military personnel for relevant challenges they might encounter during far more difficult circumstances” (Forsvarsdepartementet, 2006a)²⁰.

Now, the question is whether they have fulfilled the aim of preparing the Armed Forces through a more comprehensive approach to ethics education. To answer research question two, whether it is possible to prepare soldiers for COIN operations, the informants were asked a series of questions of how their training had been, what they thought of it, how it corresponded with real-life situations in Afghanistan, and their ability to cope with morally demanding situations based on this training.

The analysis concerning the first research question found that making this distinction in Afghanistan is nearly impossible in many situations, unless a person is in fact being directly attacked. The soldiers I interviewed emphasised that there were circumstances that would make it easier to come to a conclusion, but that in the end they could never be certain that the targeted person was not a civilian. This section seeks to answer the second research question of whether it is possible to prepare soldiers for moral dilemmas in COIN conflicts. By matching the soldiers' experiences with their training and their combat experiences in Afghanistan I seek to detect missing factors, and factors that can be improved in the pre-deployment training concerning morally and ethically difficult situations.

All informants expressed an overall satisfaction with their general training and their deployment to Afghanistan. However, when asked in detail about their ethical training before deploying their answers differed. All had undergone theoretical training in the Law of Armed Conflict and NATO's ROE, followed up with thought experiments and discussion in classrooms, but also in smaller groups within their units. Especially discussing in groups, they

²⁰ My translation

argued was of great value both before deploying and during their deployment, as it gave them the opportunity to reflect on difficult issues in an environment where everyone was in the same situation. For some, one informant said, the theoretical training they went through was sometimes the first experience the youngest soldiers had with discussing ethical dilemmas as such, and it was important he thought that this started as early in training as possible so that they had a good understanding of the theoretical principles before starting with practical training. Although one respondent expressed that he thought the soldiers could have benefitted from more theoretical training, he had found the theoretical training satisfactory. It was the practical training he thought needed most improvement, and would be most helpful in the field.

When it came to the practical training, one respondent claimed not to have gone through any practical training relating to ethical dilemmas at all before deploying to Afghanistan. This answer clearly diverged from the other respondents, even with those who had served in the same unit. This respondent, it should be noted, was the one with the least experience, and the shortest time served in Afghanistan – only three months. The other five respondents spoke of the practical training as an important integral part of their military and ethical training. They went through scenarios and different cases with the intention of putting the ROEs into practice. This training was seen as very important as it helped the soldiers understand the theory better. The practical training would try to mirror real-life situations in Afghanistan, so that the soldiers would be better prepared for certain situations once deployed. Some of these training schemes, one respondent told me, would change as intelligence reports got back from Afghanistan. This entailed that the units had to adapt to new situations and scenarios, and hence change their training continuously. This has as I see it both an advantage and a disadvantage. The advantage is that changing the training continuously allows the soldiers to train for a number of different scenarios, but at the same time, there is a possibility that this could lead to a superficial insight into each situation. For, the more the respondents practiced one scenario or dilemma that could occur in a certain situation, the better did they say they knew how to react to such situations in Afghanistan.

The respondents disagreed on whether the practical training was relevant for what they faced in Afghanistan. Three respondents found that the training coincided very well with real-life situations; one even said it was as realistic as possible. Yet another respondent emphasised that he had gone through good training, and that this training did in most circumstances reflect

what he had encountered in Afghanistan, but that he had also been in situations that were nothing like what they had trained for and found that very challenging. He mentioned one situation outside a village where his partner had been faced with a dilemma. Someone had approached them from a distance by car, and although they both had signalled him to stop, the car did not do so until very close to them, about 10-15 meters. His partner, he said, had been in doubt of whether to shoot or not, but had in the end decided on the latter. The informant was asking himself what he would do in the same situation, because after all, this kind of situation would have come under the right of self-defence, as the soldiers would have felt threatened. Such scenarios he said were the hardest scenarios they could encounter, and which really put them in a moral dilemma, as they had no idea of who were driving the car. Handling such situations he thought to be very hard as training for split-second decisions is challenging. In the end, he told me, it was all about protecting yourself and your team.

The last informant, the one I described differed from the others on all accounts, had a very different view on the relevance of the training compared to the others. He had like the informant above experienced more demanding situations than the other four, and as you can see from the citation below, he had a less positive view on whether the training coincided with real-life events;

“You can never be prepared for war, you can try, but you can never be well enough prepared. Those elements you find in war, you don’t get them in training. The training can be close to what you find in war, but you can never practice for war. Of course, I’d wish that the ROE education were much better than it is, but that goes for so many things. The training was OK”.

One of the reasons he gave for this was the ever-changing scenario, there would always be another element added to a situation that had not been envisioned during training. As can be seen from the citation below, this was a major challenge:

“It is the contextual variations that make it so hard to compare situations. You have to interpret those specific situations that you are in. It has to be done fast. Very fast. And it’s very, very, hard. So you are dependent on ethical values and principles that make your intuitive actions right. Or right enough”.

This respondent had experienced being in a situation where he had to determine whether a person actually constituted a threat or not. He describes this as very difficult, and the fact that

this decision had to be taken in a split-second made it even harder. On the question on whether he found the training they had good enough he replied:

“It should be more. [...] So that you have more training and more reference points to situations. Because in the end, if something goes wrong and you’re not within ROE guidelines, then you have a problem. And you have to be sure that you know the guidelines. If you are not, then... then you hesitate. If the worst comes to the worst, this affects you or someone around you because you can’t deal with the situation, or because you didn’t react the right way. If you don’t react, and someone dies on your side, or you do react, but too quickly and kills someone you shouldn’t have, then it’s hanging over you [...]”.

He further emphasised that more training could be beneficial as *“It does make it easier for the soldiers. [...] to actually use the ROEs, and learn how to react correctly. But again, it is what you have time for. And you just don’t have time for it before deployment”.*

Those who had experienced such situations said that making the distinction between combatants and non-combatants was very hard; in fact one informant termed it as impossible. Although they had discussed the topic, the four others had not been in similar situations. Thus, there is no way of knowing if they would react differently than the two informants. If such a situation had occurred, they might have found it equally unsettling and hence changed their thoughts on how hard drawing a distinction between combatants and non-combatants is.

As seen above, the informants differed in terms of how useful they found the ethical training. It can seem as those who had been in more difficult situations than the others were more critical of the training, but it is not certain that this is the reason. There might be other variables influencing this, that I have not touched upon in this study.

5.4 Concluding remarks

From the above analysis it is clear that the main challenge the Norwegian soldiers are facing when distinguishing between combatants and non-combatants in Afghanistan is to identify enemy combatants. This is especially hard, as insurgents are sometimes indistinguishable from civilians in terms of clothing. The challenges are also greater in densely populated areas

where there are civilians present, as the insurgents know to use to their advantage. Below are some concluding remarks on the two research questions that were analysed above.

5.4.1 Research question one

The first research question “*is it possible to distinguish combatants from non-combatants in Afghanistan*” was answered by mapping out which criteria the Norwegian Armed Forces were applying in Afghanistan. Furthermore, the application of the criteria was studied to see if they could be placed in a group-based approach, a behaviour-based approach, a combination of the two former, or whether they could be applied at all.

I found that the Armed Forces were largely using a behaviour-based approach, but that they also used one criterion from the group-based approach. Hence, outcome three from section 4.7; a combination of both approaches is used, but with a majority of the criteria coming from the behaviour-based approach. This suggests that of the two approaches to the principle of discrimination within JWT, the behaviour-based approach is the most relevant in the conflict in Afghanistan. Whether this is true in other conflicts as well, will be further discussed in chapter 6. A permanent change from a group-based approach to a behaviour-based approach in conflicts will mean that soldiers need new guidelines, and perhaps new ways of preparing for such conflicts.

5.4.2 Research question two

Research question two, whether it is possible to prepare soldiers for applying the principle of discrimination in counterinsurgencies, was answered by analysing and comparing the soldiers’ answers from the interviews about training. The analysis above shows that in COIN operations such as the one in Afghanistan, the principle of discrimination is nearly impossible to apply with certainty. The only sure way of knowing that you are targeting a combatant is if the combatant is in fact attacking you. Other threats, however plausible they are, may in fact turn out to be a non-threat as with the incident with the vehicle depicted above. With such threats it comes down to the soldier’s perception of the situation, and his or her ability to make the right decision in that very moment. Such situations, the analysis suggests, are hard to handle, and difficult to prepare for. The analysis suggests that soldiers find it easier to handle situations if they have repeatedly trained for a similar situation while at home. Hence, would it be advantageous for the Norwegian Armed Forces to train more for ethically and

morally challenging situations in pre-deployment periods. I will return to this, and other practical implications from the study in section 6.2.

The informants' answers to the question about training differed. Four of them found the training to be satisfactory, whereas the two others meant that there could have been more emphasis on the ethical aspects of the training, both theoretically and practically. As these two informants were the same ones that had experienced ethically demanding situations I draw the conclusion that those who have experienced situations where they have had to make a split-second decision on whether someone was a combatant or non-combatant, or a threat, felt that there could have been more focus on such situations during pre-deployment training. Thus is it a need for a greater focus on ethical training as those who actually encounter such situations would find it advantageous to have been through a similar scenario earlier.

6 Conclusions and implications

In this study I have explored whether the principle of discrimination is applicable in the conflict in Afghanistan, and whether it is possible to prepare soldiers for moral dilemmas when applying the principle in a counterinsurgency conflict such as the one in Afghanistan. The study has been of a qualitative nature and I have used semi-structured interviews as a method for collecting data. Six members of the Norwegian Armed Forces on an operational level have participated in the study and the interviews with these soldiers form the basis for my analysis.

In section 4.7 I mapped out four possible outcomes for research question one. The first outcome was that the Norwegian Armed Forces were using a group-based approach based on Walzer's notion of just war theory (JWT). The second, a behaviour-based approach, as seen in May's interpretation of the principle in JWT. The third outcome was a combination of the two first approaches and implied that it is possible to distinguish combatants from non-combatants. The fourth outcome was that the Norwegian Armed Forces were not able to use any of the criteria, and that drawing a distinction between combatants and non-combatants in Afghanistan is impossible.

In the analysis concerning research question one I found that Norwegian Armed Forces are using three criteria when distinguishing combatants from non-combatants; *the constitution of a threat, behaviour, and clothing*. The clothing criterion is from the group-based approach, and the criteria of constitution of a threat and behaviour are from the behaviour-based approach. This leads to the conclusion that it is outcome three that is being used in Afghanistan. This entails that Michael Walzer's approach is less significant today than it used to be. It can be assumed that this has to do with the type of war being fought, and that his approach therefore is not applicable in counterinsurgencies. Larry May's approach on the other hand is more relevant, as the majority of criteria being used are behaviour-based. The theoretical implications of this will be outlined in the following section.

Situations and circumstances put into context will in most cases help soldiers distinguish between combatants and non-combatants. But then again, as one soldier mentioned;

“there are these situations where you have a split second to decide how to act. And these situations are hard and difficult. There is always a chance that you are wrong, but we are at war and the decision has to be taken. Sometimes it might be the wrong decision”.

The analysis of research question two found that four of the soldiers I interviewed perceive their ethical education and training as sufficient for the situations they encounter in Afghanistan. The two last informants expressed that they would have preferred a stronger focus on the ethical education, both theoretically and practically. Those who wanted more ethical education as part of the pre-deployment had experienced situations in which they did not feel prepared. Although one should be careful to generalise from small-n qualitative studies, it can be concluded that it is difficult to prepare for situations which are characteristic for insurgency warfare.

It is important to remember that these results do not represent the experiences of the Norwegian Armed Forces as a whole, only the experiences of the six informants I have interviewed. The results can however be indicative for the rest of the Norwegian Armed Forces operating under the same circumstances, and even other states' armed forces in similar types of warfare. For as George and Bennett (2005) argues, case studies can have contingent validity, meaning that the results can be transferable to similar units in similar situations. Thus, it is not unlikely that the results in this study can be transferred to other soldiers in similar COIN operations.

6.1 Theoretical implications of the study

The first part of the analysis focused on whether it is possible to distinguish combatants from non-combatants in Afghanistan. In this section I will outline the theoretical implications of the study. Based on the data I have collected and the analysis above, it is clear that the framework of IHL is insufficient for determining who are legitimate targets in Afghanistan, and who are not. Just war theory, which has laid the foundation for the international framework, is also suffering from the ability to solve some of the dilemmas that Norwegian Armed Forces are encountering in Afghanistan. Both IHL and JWT frameworks are developed with conventional warfare in mind, and in COIN operations, these frameworks are not giving the

soldiers good enough guidelines for combat situations. This can lead to the following recommendations:

While just war theory as interpreted by Michael Walzer argues that group-affiliation is sufficient as a criterion for distinguishing combatants from non-combatants, May argues that soldier instead should use a fine-grained approach and rather distinguish based on criteria of threat and behaviour. I have found that in Afghanistan, soldiers cannot be asked to draw a distinction between combatants and non-combatants based on group-affiliation only. This requirement is not sufficient in the Afghanistan conflict, and can lead to non-combatants and civilians being unintentionally targeted.

It can be argued that international humanitarian law is not a sufficient framework for soldiers in counterinsurgency conflicts. Changing IHL on the other hand is easier said than done. It is important that there are general rules that are applicable for all types of conflicts. Changes however, may be done other places, for instance can the terms combatants and non-combatants and the like be better operationalized in Rules of Engagement to better help soldiers identify and distinguish between them. One problem with this suggestion though is that it may put the soldiers in a more difficult situation with regard to their vulnerability. It might put a lot of pressure on them if too much responsibility is given to soldiers.

6.2 Practical implications of the study

The second part of the analysis focused on whether it is possible to prepare soldiers for the challenges they face in counterinsurgencies with regard to drawing a distinction between combatants and non-combatants. The analysis found that although the informants found the training to be satisfactory, it did not prepare them for the most difficult situations in Afghanistan. The most difficult situations being those typical for COIN operations. It was impossible to decide whether a person was an insurgent or not because of the similarity with the civilian population. The crucial question was; what can be done to reach this “end state” where soldiers are well enough prepared to face these moral dilemmas? Or, at least feel better prepared than they are today. The analysis suggests that the most important factor for successfully coping with such situations is experience. Situations that the soldiers had repeatedly practised for were those situations they knew best how to react intuitively to. This

entails that more focused, and repeated training for situations with difficult moral dilemmas will lead the soldiers to better be able to make the right decision in a real-life event. Furthermore, it can be argued that a better ability to make the right decision will lead to a better-integrated strategy within the COIN framework, and hopefully an improved over-all success rate.

The analysis also found that those who had been deployed several times, found it easier to identify combatants as they started to recognise the enemy's behavioural patterns. Today deployment time for Norwegian Armed Forces to Afghanistan is on average six months. This is short compared to other states' Armed Forces, such as the US. However, in terms of recognising patterns of behaviour, longer deployments, and more experienced units can be an advantage for identifying and distinguishing combatants from non-combatants.

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Appendix

A Interview guide

B Informed consent

A Interview guide

Innledningsspørsmål

1. Hvor lenge har du jobbet i forsvaret?
2. Hvilken rang har du?
3. Hva er din rolle?
4. Hvor mange ganger har du vært deployert til Afghanistan?
 - a. Hvor lang tid har du da tilbrakt der til sammen?
5. Hvordan opplevde du Afghanistan-oppholdet ditt?

Opplæring og trening

6. Har du trening i det å håndtere situasjoner der du blir stilt ovenfor dilemmaet om du har rett til å bruke makt eller ei?
7. Kan du fortelle litt om hva denne opplæringen har bestått av?
 - a. Hvilke situasjoner har dere trent på i den praktiske delen?
 - b. Kan du fortelle litt om den teoretiske opplæringen dere har hatt?
8. Ble dere satt inn i "rules of engagement"?
 - a. Hvis ja; hva slags innføring?
 - b. Hva vet du om reglene?

Faktiske opplevelser i Afghanistan

9. Hva slags nytte hadde du av den teoretiske opplæringen?
 - a. På hvilken måte?
10. Og hva med den praktiske opplæringen?
11. Hvilke muligheter har du for å gjøre egne fortolkninger av retningslinjene?
 - a. Hvis ja; hva tenker du om situasjoner der du må ta avgjørelsene?
12. Hvem er det som tar avgjørelsene om hva som skal gjøres i slike situasjoner?
 - a. Gitt at det er rom for personlige fortolkninger, føler du at situasjoner blir behandlet ulikt fra ansvarlig til ansvarlig, og situasjon til situasjon?
13. Kan du fortelle litt om hvordan du identifiserte stridende?

- a. Har de noen ytre kjennetegn dere kan identifisere dem ut fra?
- b. Hvilke prosedyrer har dere for å avgjøre om noen er en fiende eller ikke?

B Informed consent

Forespørsel om deltakelse i form av intervju i forbindelse med min masteroppgave.

I forbindelse med min masteroppgave i Statsvitenskap ved Universitet i Oslo søker jeg våren 2012 etter personer som vil la seg intervju om de norske soldatenes opplevelse av krigen i Afghanistan.

Formålet med oppgaven er å belyse hvilke etiske utfordringer norske soldater møter i en asymmetrisk konflikt der fienden ikke alltid er like synlig.

For å gjennomføre dette trenger jeg fem personer som har tjenestegjort i Afghanistan de siste årene, og som har kamperfaring derfra. Intervjuene vil ta ca 30-45 minutter og vi kan sammen bli enige om møtested for intervjuet. Under intervjuet kommer jeg til å ta notater. Intervjuet vil og bli tatt opp med båndopptaker.

Deltakelse i prosjektet er frivillig, og du kan når som helst trekke deg. Alle opplysninger vil bli behandlet konfidensielt og det vil ikke bli mulig å identifisere hvem som har deltatt i prosjektet når man leser oppgaven. Ved prosjektets slutt (august 2012) vil opptakene og notatene bli slettet.

Vedlagt finner du en samtykkeerklæring. Om du ønsker å delta i prosjektet signerer du denne og returnerer den til meg.

Har du spørsmål kan jeg kontaktes på telefon, eller mail.

Prosjektet er meldt inn til Norsk Samfunnsvitenskapelige Database (NSD).

Med vennlig hilsen,

Eli Foss

Masterstudent ved Institutt for statsvitenskap, UIO.

Jeg vil med dette bekrefte min deltakelse i prosjektet om "Ethics and moral in Afghanistan".

Signatur.....

Telefon/email.....